

CHAPTER III
SOURCE SELECTION AND CONTRACT FORMATION

3-101 Contracting Procedures

3-101.01 Definition of Terms Used in this Section

- (1) **Bid** shall be defined as an offer submitted by a prospective contractor in response to an invitation for bid.
- (2) **Capability** as used in Section 3-101(8) (Definitions, Responsible Bidder or Offeror), means, for the purpose of these Regulations, capability at the time of award of the contract.
- (3) **Cost Analysis** is the evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.
- (4) **Cost Data** are information concerning the actual or estimated cost of labor, material, overhead, and other cost elements which have been actually incurred or which are expected to be incurred by the contractor in performing the contract.
- (5) **Cost-Reimbursement Contract** means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of these regulations, and a fee, if any.
- (6) **Discussions**, as used in the source selection process, means an exchange of information or other manner of negotiation during which the offeror and the State may alter or otherwise change the conditions, terms and price of the proposed contract. Discussions may be conducted in connection with competitive sealed proposals, sole source, and emergency procurement; discussions are not permissible in competitive sealed bidding (except to the extent permissible the first phase of multi-step sealed bidding).
- (7) **Fixed Price Contract** means a contract providing for a firm price, or a price that may be adjusted only in accordance with contract clauses providing for revision of the contract price under stated circumstances.
- (8) **Invitation for Bids** means all documents, whether attached or incorporated by reference, utilized for soliciting bids.
- (9) **Prequalification for Inclusion on Bidders Lists** means determining in accordance with Section 3-402 (Prequalification) that a prospective bidder or offeror satisfies the criteria established for being included on the bidders list.
- (10) **Price Analysis** is the evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.
- (11) **Price Data** are factual information concerning prices, including profit, for supplies, services, or construction substantially similar to those being procured. In this definition, "prices" refer to offered or proposed selling prices, historical selling prices, and current selling prices of such items. This definition refers to data relevant to both prime and subcontract prices.
- (12) **Proposal** shall be defined as the document submitted by the offeror in response to the Request for Proposals to be used as the basis for negotiations for entering into a contract. A proposal is usually requested in cases where the selection of a contractor is to be made on the basis of the performance that is offered rather than on that of price alone and may require an outline of details such as the vendor's qualifications and experience and the identification of problems and proposed solutions in addition to details of price.
- (13) **Purchase Description** means the words used in a solicitation to describe the services to be purchased and includes the statement of work or deliverables attached to, or made a part of the solicitation.

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- (14) **Request for Proposals** means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.
- (15) **Responsible Bidder or Offeror** means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance.
- (16) **Responsive Bidder or Offeror** means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids or the Request for Proposals.
- (17) **Solicitation** means an Invitation for Bids, a Request for Proposals, a request for quotations, or any other document issued by the State for the purpose of soliciting bids or proposals to perform a state contract.
- (18) **Suppliers**, as used in Section 3-402 (Prequalification) of these Regulations, means prospective bidders or offerors.

3-101.02 Exemptions Not Requiring Approval:

By authority of the Mississippi Legislature, service contracts of \$100,000 or less do not require approval of the Personal Service Contract Review Board. Contracts which do not exceed \$100,000 shall follow the procedures set forth in Section 3-204. Additionally, any contract for **the following are also exempt from the purview of the Personal Service Contract Review Board:**

- Accountant
- Actuary
- Architect
- Attorney
- Auditor
- Dentist
- Engineer
- Physician
- Utility rate expert services
- Veterinarian
- Any contracting authority exempt by Statute
- Computer or information technology-related services governed by the Mississippi Department of Information Technology Services
- Personal service contracts entered into by the Mississippi Department of Transportation
- Repairs which must comply with Section 31-7-13 of the Mississippi Code

3-101.03 Section 31-7-57 of the Mississippi Code holds state employees personally liable if they authorize or make a solicitation or award of a contract in violation of law.

3-102 General Provisions**3-102.01 Extension of Time for Bid or Proposal Acceptance:**

After opening bids or proposals, the Procurement Officer may request bidders or offerors to extend the time during which the State may accept their bids or proposals, provided that, with regard to bids, no other change is permitted. The reasons for requesting such extension shall be documented.

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3-102.03 Only One Bid or Proposal Received, No Bid Received

3-102.03.1 *One Bid Received:*

If only one responsive bid is received in response to an Invitation for Bids (including multi-step bidding), an award may be made to the single bidder if the Procurement Officer finds that the price submitted is fair and reasonable, and that either the other prospective bidders had reasonable opportunity to respond, or there is not adequate time for re-solicitation. Otherwise, the bid may be rejected pursuant to the provisions of Section 3-301.04 (Cancellation of Solicitation; Rejection of all Bids or Proposals) and:

- (1) the bid may be re-advertised and new bids or offers may be solicited; or
- (2) the proposed procurement may be canceled;
- (3) if the Procurement Officer determines in writing that the need for the supply or service continues, but that the price of the one bid is not fair and reasonable and there is no time for re-solicitation or re-solicitation would likely be futile, the procurement may then be conducted under Section 3-205 (Sole Source Procurement) or Section 3-206 (Emergency Procurements), as appropriate.

3-102.03.2 *One Proposal Received:*

If only one proposal is received in response to a Request for Proposals, the Procurement Officer may either make an award in accordance with the procedures set forth in Section 3-203 (Competitive Sealed Proposals) of these regulations or, if time permits, re-solicit for the purpose of obtaining competitive sealed proposals.

3-102.03.3 *No Bid or Proposal Received:*

If no bid or proposal is received in response to an Invitation, (1) the bid may be re-advertised and new bids or offers may be solicited; (2) the proposed procurement may be canceled; or (3) an emergency procurement may be made in compliance with Section 3-206.

3-102.04 *Alternate Bids or Proposals:*

If alternate bids or proposals are allowed, the solicitation shall state that such bids or proposals shall be accepted, and the solicitation shall specify their treatment.

3-102.05 *Procuring Services Offered by Governmental Entities Not Under Purview of the Personal Service Contract Review Board:*

Agency requirements may be fulfilled by procuring services performed incident to the State's own programs. The head of a purchasing agency shall determine whether such services meet the State's requirements and whether the price represents a fair market value for such services. When such procurements are made from other governmental entities, the private sector need not be solicited. However, these contracts shall still be submitted for approval to the Personal Service Contract Review Board.

3-102.06 *Bid and Performance Bonds for Service Contracts:*

Bid and performance bonds or other security may be required for service contracts as the head of a purchasing agency, or such officer's designee deems advisable to protect the interest of the State. Any such requirements must be set forth in the solicitation. Bid or performance bonds should not be used as a substitute for a determination of bidder or offeror responsibility. Section 31-5-51, Mississippi Code of 1972, Annotated, sets forth

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bonding requirements applicable to construction contracts and may be considered when establishing any such requirements for service contracts.

Commentary: *An agency should not specify a specific company or insurance agency from which bonds should be purchased.*

3-102.07 *Conditioning Bids or Proposals Upon Other Awards Not Acceptable:*

Any bid or proposal which is conditioned upon receiving award of both the particular contract being solicited and another Mississippi contract shall be deemed non-responsive and not acceptable.

3-102.08 All contracts for services shall include a list of contract specifications or deliverables. These may be incorporated from the scope of work included in the solicitation of bids or proposals. This list should be used as evaluation criteria when monitoring contract performance in accordance with Section 5-102 of these regulations. The description of services to be performed should be results, not procedure oriented and should at a minimum include: (1) what service is to be performed; (2) when the service is to be performed; (3) how frequently the service is to be performed; (4) where the service is to be performed; (5) how much it will cost; (6) why the service is necessary.

3-103 Unsolicited Offers

3-103.01 *Defined:* *An unsolicited offer is any offer other than one submitted in response to a solicitation.*

3-103.02 *Processing of Unsolicited Offers:*

The Procurement Officer or the head of the purchasing agency shall consider the offer as provided in this section. If an agency that receives an unsolicited offer decides to make an award based on this offer, the agency shall notify the Personal Service Contract Review Board that the award was the result of an unsolicited offer.

3-103.03 *Conditions for Consideration:*

To be considered for evaluation, an unsolicited offer: (1) must be in writing; (2) must be sufficiently detailed to allow a judgment to be made concerning the potential utility of the offer to the State; (3) must be unique or innovative to State use; (4) must demonstrate that the proprietary character of the offering warrants consideration of the use of sole-source procurement; (5) may be subject to testing under terms and conditions specified by Mississippi.

3-103.04 *Evaluation:*

The unsolicited offer shall be evaluated to determine its utility to the State and whether it would be to the State's advantage to enter into a contract based on such offer. If an award is to be made on the basis of such offer, the sole source procedures in Section 3-205 (Sole Source Procurement) shall be followed.

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3-103.05 Confidentiality:

Any written request for confidentiality of data contained in an unsolicited offer that is made in writing shall be honored. If an award is made, confidentiality of data shall be agreed upon by the parties and governed by the provisions of the contract subject to Mississippi Public Records Act of 1983. If agreement cannot be reached on confidentiality, the State may reject the unsolicited offer.

3-104 Novation/Buyout or Change of Name (Assignment)**3-104.02 No Assignments:**

No Mississippi contract requiring Personal Service Contract Review Board approval is transferable or otherwise assignable without the written consent of the Personal Service Contract Review Board; provided, however, that a contractor may assign monies receivable under a contract after due notice to the State, the contracting entity, and with approval of the Personal Service Contract Review Board.

3-104.02 Recognition of a Successor in Interest; Novation:

When, in the best interest of the State, a successor in interest may be recognized in a novation agreement in which the transferor and the transferee shall agree that: (1) the transferee assumes all of the transferor's obligations; (2) the transferor waives all rights under the contract as against the State; and (3) unless the transferor guarantees performance of the contract by the transferee, the transferee shall, if required, furnish a satisfactory performance bond.

3-104.03 Change of Name:

When a contractor requests to change the name in which it holds a contract with the State, the Contracting Agency shall, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting contractor to effect such a change of name. **THE AGREEMENT CHANGING THE NAME SHALL SPECIFICALLY INDICATE THAT NO OTHER TERMS AND CONDITIONS OF THE CONTRACT ARE THEREBY CHANGED.**

3-201 Method of Source Selection

Unless otherwise authorized by law, all Mississippi contracts for professional and personal services shall be procured using one of the following methods:

- (1) Section 3-202, Competitive Sealed Bidding;
- (2) Section 3-203, Competitive Sealed Proposals;
- (3) Section 3-204, Small Purchases;
- (4) Section 3-205, Sole-Source Procurement;
- (5) Section 3-206, Emergency Procurements.

3-202 Competitive Sealed Bidding

- (a) *Conditions for Use:* Contracts shall be awarded by competitive sealed bidding when a determination is made that this method is the best suited for a particular service.
- (b) *Invitation for Bids:* An Invitation for Bids shall be issued and shall include a purchase description and all contractual terms and conditions applicable to the procurement.

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- (c) *Public Notice:* Public notice of Invitation for Bids when anticipated expenditure is more than \$100,000 shall be made in compliance with the regulations provided herein. (See 3-202.06.)
- (d) *Bid Opening:* Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the Invitation for Bids. The name of each bidder shall be recorded. The amount of each bid and such other relevant information as may be specified by regulation may be recorded; the record and each bid shall be open to public inspection as provided in Section 1-301.01, Information on Bid Results of these regulations.
- (e) *Bid Acceptance and Bid Evaluation:* Bids shall be unconditionally accepted without alteration or correction, except as authorized in these regulations. Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable where possible. The Invitation for Bids shall set forth the evaluation criteria to be used. No criteria may be used in evaluations that are not set forth in the Invitation for Bids.
- (f) *Correction or Withdrawal of Bids; Cancellation of Awards:* Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes shall be permitted in accordance with regulations promulgated by the Personal Services Contract Review Board. After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition shall be permitted. Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes shall be supported by a written determination made by the head of a purchasing agency with the approval of the Personal Service Contract Review Board.
- (g) *Award:* The contract shall be awarded with reasonable promptness by written notice to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids.
- (h) *Multi-Step Sealed Bidding:* When it is considered impractical to initially prepare a purchase description to support an award based on price, an Invitation for Bids may be issued requesting the submission of un-priced offers to be followed by an Invitation for Bids limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

3-202.01 *Application:*
The provisions of this Regulation apply to every procurement made by competitive sealed bidding, including multi-step sealed bidding.

3-202.03 *The Invitation for Bids*

3-202.03.1 *Use*
The Invitation for Bids is used to initiate a competitive sealed bid procurement.

3-202.03.2 *Content*
The Invitation for Bids shall include the following:
(1) instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids, the address of the office to which

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bids are to be delivered, the maximum time for bid acceptance by the State, and any other special information;

(2) the purchase description, evaluation factors, delivery or performance schedule, and such inspection and acceptance requirements as are not included in the purchase description;

(3) the contract terms and conditions, including warranty and bonding or other security requirements, as applicable.

3-202.03.3 *Incorporation by Reference*

The Invitation for Bids may incorporate documents by reference provided that the Invitation for Bids specifies where such documents can be obtained.

3-202.03.4 *Acknowledgment of Amendments:*

The Invitation for Bids shall require the acknowledgment of the receipt of all amendments issued.

3-202.04 *Bidding Time*

Bidding time is the period of time between the date of distribution of the Invitation for Bids and the time and date set for receipt of bids. In each case, bidding time will be set to provide bidders a reasonable time to prepare their bids.

3-202.05 *Bidder Submissions*

3-202.05.1 *Bid Form*

The Invitation for Bids shall provide a form which shall include space in which the bid price shall be inserted and which the bidder shall sign and submit along with all other necessary submissions.

3-202.05.2 *Telegraphic Bids*

The Invitation for Bids may state that telegraphic bids and mailgrams will be considered whenever they are delivered sealed at the designated office by the time and date set for receipt of bids. Such telegraphic bids or mailgrams shall contain specific reference to the Invitation for Bids; the items, quantities, and prices for which the bid is submitted; the time and place of delivery; and a statement that the bidder agrees to all the terms, conditions, and provisions of the Invitation for Bids. Prior to an award being made, submission of an original bid shall be required.

3-202.05.3 *Facsimile and Electronic Mail (Email) Bids*

Facsimile and Email bids shall be governed by the provisions of Section 3-202.05.2, but for a bid to be acceptable when transmitted by facsimile machine or email, it shall have been transmitted to an off-site location and delivered sealed to the proper purchasing entity prior to the time and date set for the bid opening.

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3-202.06 Public Notice**3-202.06.1 Distribution**

Invitations for Bid or Notice of the Availability of Invitations for Bid shall be mailed or otherwise furnished to a sufficient number of bidders for the purpose of securing competition. Notice of Availability shall indicate where, when, and for how long Invitations for Bid may be obtained; generally describe the service desired; and may contain other appropriate information.

3-202.06.2 Publication

Every procurement of services in excess of \$100,000 shall be publicized:

- (1) in a newspaper published in the county or municipality in which the agency is located or electronic format specified by the Personal Service Contract Review Board; (mandatory)
- (2) in a newspaper of general circulation in the area pertinent to the procurement; (optional)
- (3) in industry media; (optional) or
- (4) in a government publication designed for giving public notice. (optional)

Commentary: Publication should be made at the time the RFP is issued.

3-202.06.3 Content of Advertisement

When composing the advertisement to appear in the legal notice section of the newspaper, the intent is to promote competition. Prospective bidders should be given as much information as possible in the confined space.

Commentary: The following is a suggested guide for a legal advertisement:

The *(name of the entity)* will accept sealed bids until *(time of bid opening)*, *(day of the week)*, *(month)*, *(date)*, *(year)* for the purpose of purchasing the following:

(name of service you wish to procure),
(bid file number)

Detailed specifications may be obtained by contacting *(name of contact person)* at *(telephone number)* or at *(physical mailing address)*.

3-202.06.5 Advertising Time

Advertising time is the period of time between the date of publication of the advertisement and the time and date set for receipt of bids. This section shall be interpreted to mean the advertisement for bids shall be published once each week for two consecutive weeks with the second notice being published on or after the 7th calendar day after the first notice was published. For electronic publication the advertising time shall be concurrent with a newspaper publication for two consecutive weeks. The date set for the bid opening for services shall not be less than 7 working days after the last notice appears in the newspaper. Therefore, the bid opening should not be sooner than the 8th working day.

3-202.06.6 Public Availability

A copy of the Invitation for Bids shall be made available for any interested party at the location noted in the published notice.

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3-202.08 *Pre-Bid Conferences*

Pre-bid conferences may be conducted to explain the procurement requirements. They shall be announced to all prospective bidders known to have received an Invitation for Bids. The conference should be held long enough after the Invitation for Bids has been issued to allow bidders to become familiar with it but sufficiently before bid opening to allow consideration of the conference results in preparing their bids. Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment as provided in Section 3-202.09, Amendments to Invitations for Bid; and the Invitation for Bids, if a pre-bid conference was required therein, or the notice of pre-bid conference shall so provide. A summary of the conference shall be supplied to all those prospective bidders known to have received an Invitation for Bids. If a transcript is made, it shall be a public record.

3-202.09 ***Amendments to Invitations for Bids*****3-202.09.1** *Form*

Amendments to Invitations for Bids shall be identified as such and shall require that the bidder acknowledge receipt of all amendments issued. The amendment shall reference the portions of the Invitation for Bids it amends.

3-202.09.2 *Distribution*

Amendments shall be sent to all prospective bidders known to have received an Invitation for Bids.

3-202.09.3 *Timeliness*

Amendments shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids. If the time and date set for receipt of bids will not permit such preparation, such time shall be increased to the extent possible in the amendment or, if necessary, by telegram or telephone and confirmed in the amendment.

Commentary: Amendments should be used to:

- (1) *make any changes in the Invitation for Bids such as changes in quantity, purchase descriptions, delivery schedules, and opening dates;*
- (2) *correct defects or ambiguities; or*
- (3) *furnish to other bidders information given to one bidder, if such information will assist the other bidders in submitting bids, or if the lack of such information would prejudice the other bidders. Any such information when not given to all bidders shall be cause for rejecting all bids.*

3-202.10 *Pre-Opening Modification or Withdrawal of Bids***3-202.10.1** *Procedure*

Bids may be modified or withdrawn by written notice received in the office designated in the Invitation for Bids prior to the time and date set for bid opening.

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3-202.10.2 *Disposition of Bid Security*

If a bid is withdrawn in accordance with this section, the bid security, if any, shall be returned to the bidder.

3-202.10.3 *Records*

All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate procurement file.

3-202.11 *Late Bids, Late Withdrawals, and Late Modifications***3-202.11.1** *Definition*

Any bid received after the time and date set for receipt of bids is late. Any withdrawal or modification of a bid received after the time and date set for opening of bids at the place designated for opening is late.

3-202.11.2 *Treatment*

No late bid, late modification, or late withdrawal will be considered unless receipt would have been timely but for the action or inaction of state personnel directly serving the procurement activity.

3-202.11.3 *Notice*

Bidders submitting late bids which shall not be considered for award shall be so notified as soon as practicable.

3-202.11.4 *Records*

Records equivalent to those required in Subsection 3-202.10.3 (Pre-Opening Modification or Withdrawal of Bids, Records) shall be made and kept for each late bid, late modification, or late withdrawal.

3-202.12 *Receipt, Opening, and Recording of Bids***3-202.12.1** *Receipt*

Upon its receipt, each bid and modification shall be date-stamped or time/date-stamped but not opened and shall be stored in a secure place until the time and date set for bid opening.

3-202.12.2 *Opening and Recording*

Bids and modifications shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the Invitation for Bids. The name of each bidder, the bid price, and such other information as is deemed appropriate by the Procurement Officer, shall be read aloud or otherwise made available. Such information also may be recorded at the time of bid opening; that is, the bids may be tabulated or a bid abstract made. The names of required witnesses shall also be recorded at the opening. The opened bids shall be available for inspection by participants except to the extent the bidder designates trade secrets or other proprietary data to be confidential as set forth in Subsection 3-202.12.3 of this section. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the non-confidential portion of the bid. Prices of the services offered, deliveries, and terms of

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payment shall be publicly available at the time of bid opening regardless of any designation to the contrary. Bids shall be available for inspection at any time subsequent to the awarding of the contract. Inspection shall be in compliance with Section 1-301.01 (Information on Bid Results) of these regulations.

3-202.12.3 *Confidential Data*

The Procurement Officer shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidders in writing what portions of the bids will be disclosed. The bids shall be open to inspection as set forth in Section 1-301.01 subject to any continuing prohibition on the disclosure of confidential data.

3-202.13 *Mistakes in Bids*

3-202.13.1 *General*

Correction or withdrawal of a bid because of an inadvertent, nonjudgmental mistake in the bid requires careful consideration to protect the integrity of the competitive bidding system and to assure fairness. If the mistake is attributable to an error in judgment, the bid may not be corrected.

Bid correction or withdrawal by reason of a nonjudgmental mistake is permissible but only to the extent it is not contrary to the interest of the State or the fair treatment of other bidders.

3-202.13.2 *Mistakes Discovered Before Opening*

A bidder may correct mistakes discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in Section 3-202.10 (Pre-Opening Modification or Withdrawal of Bids).

3-202.13.3 *Confirmation of Bid*

When the Procurement Officer knows or has reason to conclude that a mistake has been made, such officer should request the bidder to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn if the conditions set forth in Subsections 3-202.13.4 through 3-202.13.6 of this section are met.

3-202.13.4 *Mistakes Discovered After Bid Opening But Before Award*

This subsection sets forth procedures to be applied in three situations described in Subsections 3-202.13.4 (1) through 3-202.13.4 (3) of this subsection in which mistakes in bids are discovered after the time and date set for bid opening but before award.

(1) *Minor Informalities*: Minor informalities are matters of form rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible. The Procurement Officer shall waive such informalities or allow the bidder to correct them depending on which is in the best interest of the State. Examples include the failure of a bidder to:

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- (a) return the number of signed bids required by the Invitation for Bids;
 - (b) sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound;
 - (c) acknowledge receipt of an amendment to the Invitation for Bids, but only if:
 - (i) it is clear from the bid that the bidder received the amendment and intended to be bound by its terms; or
 - (ii) the amendment involved had a negligible effect on price, quantity, quality, or delivery.
- (2) *Mistakes where intended correct bid is evident.* If the mistake and the intended correct bid are clearly evident on the bid document, the bid shall be corrected on the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the bid document are typographical errors, errors in extending unit prices, and arithmetical errors.
- (3) *Mistakes where intended correct bid is not evident.* A bidder may be permitted to withdraw a low bid if:
- (a) a mistake is clearly evident on the bid document, but the intended correct bid is not similarly evident; or
 - (b) the bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made.

3-202.13.5 *Mistakes in Bids discovered after award*

Mistakes shall not be corrected after award of the contract except where the Personal Service Contract Review Board or the head of a purchasing agency makes a written determination that it would be unconscionable not to allow the mistake to be corrected.

3-202.13.6 *Determinations required*

When a bid is corrected or withdrawn, or correction or withdrawal is denied, under Subsections 3-202.13.4 or 3-202.13.5 of this section, the Contract Analyst or the head of a purchasing agency shall prepare a written determination showing that the relief was granted or denied in accordance with these regulations, except that the Procurement Officer shall approve the determination required under Subsection 3-202.13.4 (1) of this section.

3-202.14 *Bid Evaluation and Award*

3-202.14.1 *General*

The contract is to be awarded to the lowest, responsible bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids. See Section 3-202 (7) (Competitive Sealed Bidding, Award) of the Mississippi Personal Services Contract Regulations. The Invitation for Bids shall set forth the requirements and criteria which will be used to determine the lowest, responsive bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the Invitation for Bids.

3-202.14.2 *Responsibility and Responsiveness*

Responsibility of prospective contractors is covered by Section 3-401 (Responsibility). Responsiveness of bids is covered by Section 3-101.01 (6) which defines responsive bidder as "a person who has submitted a bid which conforms in all material respects to the Invitation for Bids."

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3-202.14.3 *Service/End Product Acceptability*

The Invitation for Bids shall set forth any evaluation criterion to be used in determining acceptability. It may require the submission of descriptive literature, technical data, or other material. It may also provide for accomplishing any of the following prior to award:

- (1) inspection or testing of a product prior to award for such characteristics as quality or workmanship;
- (2) examination of such elements as appearance, finish, taste, or feel;
- (3) other examinations to determine whether it conforms with any other purchase description requirements.

The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another but only to determine that a bidder's offering is acceptable as set forth in the Invitation for Bids. Any bidder's offering which does not meet the acceptability requirements shall be rejected as non-responsive.

3-202.14.4 *Determination of Lowest Bidder*

Following determination of acceptability as set forth in Subsection 3-202.14.3 of this section, if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the State in accordance with the evaluation criteria set forth in the Invitation for Bids. Only objectively, measurable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder. Examples of such criteria include, but are not limited to, guaranteed buy back and ownership or life-cycle cost formulas. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible such evaluation factors shall:

- (1) be reasonable estimates based upon information the State has available concerning future use; and
- (2) treat all bids equitably.

3-202.14.5 *Restrictions*

Nothing in this section shall be deemed to permit contract award to a bidder submitting more comprehensive services than that designated in the Invitation for Bids if such bidder is not also the lowest bidder as determined under Subsection 3-202.14.4 of this section. Further, this section does not permit negotiations with any bidder.

3-202.15 *Low Tie Bids***3-202.15.1** *Definition*

Low tie bids are low responsive bids from responsible bidders that are identical in price, including cash discounts offered for prompt payment, and which meet all the requirements and criteria set forth in the Invitation for Bids.

3-202.15.2 *Award*

The prime criterion for making an award where tie bids are involved shall be in compliance with Section 31-7-15 (l) and Section 31-7-47, Mississippi Code 1972, Annotated; i.e., that resident vendors shall be given preference over nonresident vendors. Award shall not be made by drawing lots, except as set forth below, or by dividing business among identical bidders. In the discretion of the head of a purchasing agency, award shall be made in any permissible manner that will discourage tie bids. If no permissible method will be effective

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in discouraging tie bids, and a written determination is made so stating, award may be made by drawing lots. In such case, those bidders involved shall be invited to attend the procedure.

3-202.15.3 *Record*

Records shall be made of all Invitation for Bids on which tie bids are received showing at least the following information:

- (1) the identification number of the Invitation for Bids;
- (2) the service;
- (3) a listing of all the bidders and the prices submitted.

A copy of each such record shall be sent to the Personal Service Contract Review Board.

3-202.16 *Documentation of Award*

Following award, a record showing the basis for determining the successful bidder shall be made a part of the procurement file.

3-202.17 *Publicizing Awards*

Written notice of award shall be sent to the successful bidder. Notice of award shall be made available to the public.

3-202.18 *Multi-Step Sealed Bidding*

3-202.18.1 *Definition*

Multi-step sealed bidding is a two-phase process consisting of a technical first phase composed of one or more steps in which bidders submit un-priced technical offers to be evaluated by the State, and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their price bids considered. It is designed to obtain the benefits of competitive sealed bidding by the awarding of a contract to the lowest responsive, responsible bidder and at the same time obtain the benefits of the competitive sealed-proposals procedure through the solicitation of technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers.

3-202.18.2 *Conditions for Use*

The multi-step sealed bidding method may be used when it is not practical to prepare initially a definitive purchase description which will be suitable to permit an award based on price. Multi-step sealed bidding may, thus, be used when it is considered desirable:

- (1) to invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirements;
- (2) to conduct discussions for the purposes of facilitating understanding of the technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;
- (3) to accomplish Subsections 3-202.18.2 (1) and 3-202.18.2 (2) of this section prior to soliciting priced bids; and
- (4) to award the contract to the lowest responsive and responsible bidder in accordance with the competitive sealed bidding procedures.

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- 3-202.19 *Pre-Bid Conferences in Multi-Step Sealed Bidding*
Prior to the submission of unpriced technical offers, a pre-bid conference as contemplated by Section 3-202.08 (Pre-Bid Conferences) may be conducted by the Procurement Officer. The Procurement Officer may also hold a conference of all potential bidders in accordance with Section 3-202.08 at any time during the evaluation of the unpriced technical offers.
- 3-202.20 *Procedure for Phase One of Multi-Step Sealed Bidding*
- 3-202.20.1 *Form*
Multi-step sealed bidding shall be initiated by the issuance of an Invitation for Bids in the form required by Section 3-202.03 (The Invitation for Bids), except as hereinafter provided. In addition to the requirements set forth in Section 3-202.03, the multi-step, Invitation for Bids shall state:
- (1) that unpriced technical offers are requested;
 - (2) whether priced bids are to be submitted at the same time as unpriced technical offers; if they are, such priced bids shall be submitted in a separate sealed envelope;
 - (3) that it is a multi-step sealed bid procurement, and priced bids will be considered only in the second phase and only from those bidders whose unpriced technical offers are found acceptable in the first phase;
 - (4) the criteria to be used in the evaluation of the unpriced technical offers;
 - (5) that the State, to the extent the Procurement Officer finds necessary, may conduct oral or written discussions of the unpriced technical offers;
 - (6) that bidders may designate those portions of the unpriced technical offers which contain trade secrets or other proprietary data which are to remain confidential, subject to Section 25-61-9 and 79-23-1 of the Mississippi Code; and
 - (7) that the item being procured shall be furnished in accordance with the bidder's technical offer as found to be finally acceptable and shall meet the requirements of the Invitation for Bids.
- 3-202.20.2 *Amendments to the Invitation for Bids*
After receipt of unpriced technical offers, amendments to the Invitation for Bids shall be distributed only to bidders who submitted unpriced technical offers, and they shall be permitted to submit new unpriced technical offers or to amend those submitted. If, in the opinion of the Procurement Officer, a contemplated amendment will significantly change the nature of the procurement, the Invitation for Bids shall be canceled in accordance with Section 3-301.04 (Cancellation of Solicitation; Rejection of All Bids or Proposals) of this chapter and a new Invitation for Bids issued.
- 3-202.20.3 *Receipt and Handling of Unpriced Technical Offers*
Unpriced technical offers shall not be opened publicly but shall be opened in front of two or more (procurement) officials. Such offers shall not be disclosed to unauthorized persons. Bidders may request nondisclosure of trade secrets and other proprietary data identified in writing.
- 3-202.20.4 *Evaluation of Unpriced Technical Offers*

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The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation for Bids. The unpriced technical offers shall be categorized as:

- (1) acceptable;
- (2) potentially acceptable; that is, reasonably susceptible of being made acceptable; or
- (3) unacceptable.

The Procurement Officer shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file. The Procurement Officer may initiate Phase Two of the procedure if, in the Procurement Officer's opinion, there are sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without technical discussions. If the Procurement Officer finds that such is not the case, the Procurement Officer shall issue an amendment to the Invitation for Bids or engage in technical discussions as set forth in Subsection 3-202.20.5 of this section.

3-202.20.5 *Discussion of Unpriced Technical Offers*

The Procurement Officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable technical offer. During the course of such discussions, the Procurement Officer shall not disclose any information derived from one Unpriced technical offer to any other bidder. Once discussions are begun, any bidder who has not been notified that its offer has been finally found unacceptable may submit supplemental information amending its technical offer at any time until the closing date established by the Procurement Officer. Such submission may be made at the request of the Procurement Officer or upon the bidder's own initiative.

Commentary: *It is considered desirable for the Procurement Officer to keep a record of the date, place, and purpose of meeting and those attending.*

3-202.20.6 *Notice of Unacceptable Unpriced Technical Offer*

When the Procurement Officer determines a bidder's unpriced technical offer to be unacceptable, such offeror shall not be afforded an additional opportunity to supplement its technical offer.

3-202.21 *Mistakes During Multi-Step Sealed Bidding*

Mistakes may be corrected or bids may be withdrawn during Phase One at any time. During Phase Two, mistakes may be corrected or withdrawal permitted in accordance with Section 3-202.13 (Mistakes in Bids).

3-202.22 *Procedure for Phase Two*

3-202.22.1 *Initiation*

Upon the completion of Phase One, the Procurement Officer shall either:

- (1) open priced bids submitted in Phase One (if priced bids were required to be submitted) from bidders whose unpriced technical offers were found to be acceptable; or
- (2) if priced bids have not been submitted, technical discussions have been held, or amendments to the Invitation for Bids have been issued, invite each acceptable bidder to submit a priced bid.

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3-202.22.2 Conduct

Phase Two shall be conducted as any other competitive sealed bid procurement except:

- (1) no public notice need be given of this invitation to submit priced bids because such notice was previously given;
- (2) after award, the unpriced technical offer of the successful bidder shall be disclosed as follows: The Procurement Officer shall examine written requests of confidentiality for trade secrets and proprietary data in the technical offer of such bidder to determine the validity of any such requests. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidder in writing what portions of the unpriced technical offer will be disclosed. Such technical offer shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data in accordance with Section 25-61-92 and 79-23-1 of the Mississippi Code; and
- (3) unpriced technical offers of bidders who are not awarded the contract shall not be open to public inspection unless the head of the purchasing agency determines in writing that public inspection of such offers is essential to assure confidence in the integrity of the procurement process; provided, however, that the provisions of Subsection 3-202.22.2(2) of this section shall apply with respect to the possible disclosure of trade secrets and proprietary data.

Commentary: *The obligation to keep data confidential is not intended to create any liability that would not otherwise exist under State law.*

3-203 Competitive Sealed Proposals

- (a) *Conditions for Use:* When, under regulations approved by the Personal Service Contract Review Board, the head of a purchasing agency, or designee, determines that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive sealed proposals.
- (b) *Request for Proposals:* Proposals shall be solicited through a Request for Proposal.
- (c) *Public Notice:* Adequate public notice of the Request for Proposals shall be given in the same manner as provided in Section 3-202 (c) and 3-202.06 (Competitive Sealed Bidding, Public Notice).
- (d) *Receipt of Proposals:* Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A Register of Proposals shall be prepared and shall be open for public inspection after contract award. The Register of Proposals shall indicate the name of all vendors submitting proposals.
- (e) *Evaluation Factors:* The Request for Proposals shall state the relative importance of price and other evaluation factors (i.e. Important, Very Important, Critical).
- (f) *Discussion with Responsible Offerors and Revisions to Proposals:* As provided in the Request for Proposals and as set forth in these regulations, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions,

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there shall be no disclosure of any information derived from proposals submitted by competing offerors.

- (g) *Award:* Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State taking into consideration price and the evaluation factors set forth in the Request for Proposals. No other factors or criteria shall be used in the evaluation.

3-203.01 *Application*

The provisions of this chapter apply to every procurement of personal or professional services made by competitive sealed proposals. Provisions of this chapter may be used as a guideline when making other procurements by competitive sealed proposals.

3-203.02 *Conditions for Use of Competitive Sealed Proposals*

3-203.02.1 *"Practicable" Distinguished From "Advantageous"*

As used in Section 3-203 (1) (Competitive Sealed Proposals, Conditions for Use), the words "practicable" and "advantageous" are to be given ordinary dictionary meanings. The term "practicable" denotes what may be accomplished or put into practical application. "Advantageous" connotes a judgmental assessment of what is in the State's best interest. Competitive sealed bidding may be practicable; that is, reasonably possible but not necessarily advantageous; that is, not in the State's best interest.

3-203.02.2 *General Discussion*

If competitive sealed bidding is not practicable, competitive sealed proposals should be used. If competitive sealed bidding is practicable, it may then be considered whether competitive sealed bidding is advantageous. If competitive sealed bidding is determined not to be advantageous, competitive sealed proposals may be used.

The key element in determining advantageousness is the need for flexibility. The competitive sealed-proposals method differs from competitive sealed bidding in two important ways:

Competitive sealed proposals:

- (1) permit discussions with competing offerors and changes in their proposals including price.
- (2) allow comparative judgmental evaluations to be made when selecting among acceptable proposals for award of the contract.

An important difference between competitive sealed proposals and competitive sealed bidding is the finality of initial offers. Under competitive sealed proposals, alterations in the nature of a proposal and in prices may be made after proposals are opened. Such changes are not allowed, however, under competitive sealed bidding (except to the extent allowed in the first phase of multi-step sealed bidding). Therefore, unless it is anticipated that a contract can be awarded solely on the basis of information submitted by bidders at the time of opening, competitive sealed bidding is not practicable or advantageous.

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Another consideration concerns the type of evaluations needed after offers are received. Where evaluation factors involve the relative abilities of offerors to perform, including degrees of technical or professional experience or expertise, use of competitive sealed proposals is the appropriate procurement method. Similarly, such method is appropriate where the type of need to be satisfied involves weighing artistic and aesthetic values to the extent that the price is a secondary consideration. Further, where the types of services may require the use of comparative judgmental evaluations to evaluate them adequately, use of competitive sealed proposals is the appropriate method.

3-203.02.3 *When competitive sealed bidding is not practicable*

Competitive sealed bidding is not practicable unless the nature of the procurement permits award to a low bidder who agrees by its bid to perform without condition or reservation in accordance with the purchase description, delivery or performance schedule, and all other terms and conditions of the Invitation for Bids. Factors to be considered in determining whether competitive sealed bidding is not practicable include:

- (1) whether the contract needs to be other than a fixed-price type;
- (2) whether oral or written discussions may need to be conducted with offerors concerning technical and price aspects of their proposals;
- (3) whether offerors may need to be afforded the opportunity to revise their proposals, including price;
- (4) whether award may need to be based upon a comparative evaluation as stated in the Request for Proposals of differing price, quality, and contractual factors in order to determine the most advantageous offering to the State - quality factors include technical and performance capability and the content of the technical proposal; and
- (5) whether the primary consideration in determining award may not be price.

3-203.02.4 *When competitive sealed bidding is not advantageous*

A determination may be made to use competitive sealed proposals if it is determined that it is not advantageous to the State, even though practicable, to use competitive sealed bidding. Factors to be considered in determining whether competitive sealed bidding is not advantageous include:

- (1) if prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the State; and
- (2) whether the factors listed in Subsections 3-203.02.3 (2) through 3-203.02.3 (4) of this section are desirable in conducting a procurement rather than necessary; if they are, then such factors may be used to support a determination that competitive sealed bidding is not advantageous.

Commentary. *The following is offered as an example of circumstances when formal competitive sealed bidding is "practicable" but not "advantageous." (The word "practicable" is given its "ordinary dictionary meaning," and Webster's Unabridged 3rd Edition gives the following as the primary definition as "practicable": "possible to practice or perform," the remaining definitions being to similar effect.)*

It could be "practicable" to invite competitive sealed bids on a functional specification prepared by the State for services that are highly specialized such as producing job classifications. However, the contract award would likely better serve the State's interest if it were made on the basis of the most

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advantageous proposal rather than the lowest responsive and responsible bidder. Therefore, it would not be "advantageous" to the State to take competitive sealed bids; that is, the State's specification could conceivably result in an acceptable product, but another could have been obtained more economically and in a form that would better serve the needs of the State but for the strictures of competitive sealed bidding. Competitive sealed proposals would also afford the opportunity to discuss design characteristics with the offerors as the discussions proceeded.

3-203.02.5 *Determinations*

- (1) Before a contract may be entered into by competitive sealed proposals, the head of a purchasing agency or designee shall determine that competitive sealed bidding is either not practicable or not advantageous to the State.
- (2) That a reasonable inquiry has been conducted, which shall include requesting the department to report on the availability of such personnel, and the using agency does not have the personnel nor resources to perform the services required under the proposed contract, or that the service can be performed more economically by other than state personnel.
- (3) The nature of the relationship to be established between the using agency and the contractor by the proposed contract.
- (4) That the using agency has developed and fully intends to implement a written plan for utilizing such services which will be included in the contractual statement of work.

3-203.03 *Content of the Request for Proposals*

3-203.03.1 The Request for Proposals shall be prepared in accordance with Section 3-202.03 (The Invitation for Bids) provided that it shall also include:

- (1) a statement that discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award, but that proposals may be accepted without such discussions; and
- (2) a statement of when and how price should be submitted.

3-203.03.2 The Request for Proposals shall be in the form specified by the Procurement Officer and contain at least the following information:

- (1) type of services required;
- (2) a description of the work involved;
- (3) an estimate of when and for how long the services will be required;
- (4) the type of contract to be used;
- (5) a date by which proposals for the performance of the services shall be submitted;
- (6) a statement that the proposals shall be in writing;
- (7) a statement that offerors may designate those portions of the proposals which contain trade secrets or other proprietary data which may remain confidential in accordance with Section 25-61-9 and 79-23-1 of the Mississippi Code;
- (8) a statement of the minimum information that the proposal shall contain, to include:
 - (a) the name of the offeror, the location of the offeror's principal place of business and, if different, the place of performance of the proposed contract;
 - (b) the age of the offeror's business and average number of employees over a previous period of time, as specified in the Request for Proposals;

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- (c) the abilities, qualifications, and experience of all persons who would be assigned to provide the required services;
 - (d) a listing of other contracts under which services similar in scope, size, or discipline to the required services were performed or undertaken within a previous period of time, as specified in the Request for Proposals; and
 - (e) a plan giving as much detail as is practical explaining how the services will be performed.
- (9) the factors to be used in the evaluation and selection process and their relative importance. (See Appendix B for sample Request for Proposal.)

3-203.04 *Proposal Preparation Time*

Proposal preparation time shall be set to provide offerors a reasonable time to prepare their proposals.

3-203.05 *Form of Proposal*

The manner in which proposals are to be submitted, including any forms for that purpose, may be designated as a part of the Request for Proposals.

3-203.06 *Public Notice*

Public notice shall be given by distributing the Request for Proposals in the same manner provided for distributing an Invitation for Bids under Section 3-202.06 (Public Notice).

3-203.08 *Pre-proposal Conferences*

Pre-proposal conferences may be conducted in accordance with Section 3-202.08 (Pre-Bid Conferences). Any such conference should be held prior to submission of initial proposals.

3-203.09 *Amendments to Requests for Proposals*

Amendments to Requests for Proposals may be made in accordance with Section 3-202.09 (Amendments to Invitations for Bids) prior to submission of proposals. After submission of proposals, amendments may be made in accordance with Section 3-202.20.2 (Procedure for Phase One of Multi-Step Sealed Bidding, Amendments to the Invitation for Bids).

3-203.10 *Modification or Withdrawal of Proposals*

Proposals may be modified or withdrawn prior to the established due date in accordance with Section 3-202.10 (Pre-Opening Modification or Withdrawal of Bids). For the purposes of this section and Section 3-203.11 (Late Proposals, Late Withdrawals, and Late Modifications), the established due date is either the time and date announced for receipt of proposals or receipt of modifications to proposals, if any; or if discussions have begun, it is the time and date by which best and final offers must be submitted, provided that only offerors who submitted proposals by the time announced for receipt of proposals may submit best and final offers.

3-203.11 *Late Proposals, Late Withdrawals, and Late Modification*

Any proposal, withdrawal, or modification received after the established due date at the place designated for receipt of proposals is late. See Section 3-203.10 (Modification or Withdrawal of Proposals) for the definition of "established due date." They may only be considered in accordance with Section 3-202.11 (Late Bids, Late Withdrawals, and Late Modifications).

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3-203.12 *Receipt and Registration of Proposals*

Proposals shall not be opened publicly but shall be opened in the presence of two or more procuring agency officials. Proposals and modifications shall be date-stamped or time/date-stamped upon receipt and held in a secure place until the established due date. After the date established for receipt of proposals, a Register of Proposals shall be prepared which shall include for all proposals the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the service offered. The Register of Proposals shall be open to public inspection only after award of the contract. Proposals and modifications shall be shown only to personnel having a legitimate interest in them.

3-203.12.1 *Requests for Nondisclosure of Data*

If the offeror selected for award has requested in writing the nondisclosure of trade secrets and other proprietary data so identified, the Procurement Officer shall examine the request in the proposal to determine its validity prior to entering negotiations. If the parties do not agree as to the disclosure of data in the contract, the head of the agency conducting the procurement or a designee of such officer, shall inform the offeror in writing what portion of the proposal will be disclosed and that unless the offeror withdraws the proposal, the proposal will be so disclosed.

3-203.13 *Evaluation of Proposals***3-203.13.1 *Evaluation Factors in the Request for Proposals***

The Request for Proposals shall state all of the evaluation factors, including price, and their relative importance.

3-203.13.2 *Evaluation*

The evaluation shall be based on the evaluation factors set forth in the Request for Proposals. Numerical rating systems may be used but are not required. Factors not specified in the Request for Proposals shall not be considered. The following factors shall be considered in conducting the evaluation. The relative importance of these and other factors will vary according to the type of services being procured. The minimum factors are:

- (1) the plan for performing the required services;
- (2) ability to perform the services as reflected by technical training and education, general experience, specific experience in providing the required services, and the qualifications and abilities of personnel proposed to be assigned to perform the services;
- (3) the personnel, equipment, and facilities to perform the services currently available or demonstrated to be made available at the time of contracting;
- (4) a record of past performance of similar work; and
- (5) price.

3-203.13.3 *Classifying Proposals*

For the purpose of conducting discussions under Section 3-203.14 (Proposal Discussions with Individual Offerors), proposals shall be initially classified as:

- (1) acceptable;
- (2) potentially acceptable; that is, reasonable susceptible of being made acceptable; or
- (3) unacceptable.

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Offerors whose proposals are unacceptable shall be so notified promptly.

3-203.14 *Proposal Discussions with Individual Offerors*

3-203.14.1 *"Offerors" Defined:*

For the purposes of Section 3-203 (6) (Competitive Sealed Proposals, Discussion with Responsible Offerors and Revisions to Proposals) of the Mississippi Service Contract Regulations and this section, the term "offerors" includes only those businesses submitting proposals that are acceptable or potentially acceptable. The term shall not include businesses who submitted unacceptable proposals.

3-203.14.2 *Purposes of Discussions*

Discussions are held to:

- (1) promote understanding of the State's requirements and the offeror's proposals;
- (2) facilitate arriving at a contract that will be most advantageous to the State taking into consideration price and the other evaluation factors set forth in the Request for Proposals; and
- (3) determine in greater detail such offeror's qualifications.

3-203.14.3 *Conduct of Discussions*

Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. The Procurement Officer should establish procedures and schedules for conducting discussions. If, during discussions, there is a need for any substantial clarification of or change in the Request for Proposals, the Request shall be amended to incorporate such clarification or change. Auction techniques (revealing one offeror's price to another) and/or disclosure of any information derived from competing proposals are prohibited. Any substantial oral clarification of a proposal shall be reduced to writing by the offeror.

Commentary: *It is considered desirable for the Procurement Officer to keep a record of the date, place, and purpose of meetings and those attending.*

3-203.14.4 *Best and Final Offers*

If contemplated by the RFP and required for proper evaluation, the Procurement Officer shall establish a common date and time for the submission of best and final offers. Best and final offers shall be submitted only once; provided, however, the Director of a purchasing agency may make a written determination that it is in the State's best interest to conduct additional discussions or change the State's requirements and require another submission of best and final offers. Otherwise, no discussion of or changes in the best and final offers shall be allowed prior to award. Offerors shall also be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediate previous offer will be constructed as their best and final offer.

3-203.15 *Mistakes in Proposals*

3-203.15.1 *Modification or Withdrawal of Proposals*

Proposals may be modified or withdrawn as provided in Section 3-203.10 (Modification or Withdrawal of Proposals).

3-203.15.2 *Confirmation of Proposal*

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When the Procurement Officer knows or has reason to conclude before award that a mistake has been made, such officer should request the offeror to confirm the proposal. If the offeror alleges mistake, the proposal may be corrected or withdrawn during any discussions that are held or if the conditions set forth in Subsections 3-203.15.3 through 3-203.15.5 of this section are met.

3-203.15.3 *Mistakes discovered after receipt of Proposals but before Award*

This subsection sets forth procedures to be applied in four situations in which mistakes in proposals are discovered after receipt of proposals but before award.

- (1) *During Discussions; Prior to Best and Final Offers:* Once discussions are commenced with any offeror or after best and final offers are requested, any offeror may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.
- (2) *Minor Informalities:* Minor informalities, unless otherwise corrected by an offeror as provided in this section, shall be treated as they are under competitive sealed bidding. See Section 3-202.13.4 (a) (Mistakes in Bids, Mistakes Discovered After Opening but Before Award).
- (3) *Correction of Mistakes:* If discussions are not held or if the best and final offers upon which award will be made have been received, mistakes may be corrected and the intended correct offer considered only if:
 - (a) the mistake and the intended correct offer are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn; or
 - (b) the mistake is not clearly evident on the face of the proposal, but the offeror submits proof of evidentiary value which clearly and convincingly demonstrates both the existence of a mistake and the intended correct offer, and such correction would not be contrary to the fair and equal treatment of other offerors.
- (4) *Withdrawal of Proposals:* If discussions are not held or if the best and final offers upon which award will be made have been received, the offeror may be permitted to withdraw the proposal if:
 - (a) the mistake is clearly evident on the face of the proposal and the intended correct offer is not;
 - (b) the offeror submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made but does not demonstrate the intended correct offer; or
 - (c) the offeror submits proof of evidentiary value which clearly and convincingly demonstrates the intended correct offer but to allow correction would be contrary to the fair and equal treatment of the other offerors.

3-203.15.4 *Mistakes discovered after Award*

Mistakes shall not be corrected after award of the contract except where the head of a purchasing agency finds it would be unconscionable not to allow the mistake to be corrected.

3-203.15.5 *Determinations required*

When a proposal is corrected or withdrawn, or correction or withdrawal is denied under Subsections 3-203.15.3 (2), (3), (4), or 3-203.15.4, a written determination shall be prepared showing that relief was granted or denied in accordance with these regulations. The head of a purchasing agency shall prepare the determination, except

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under Subsection 3-203.15.3(b), the determination may be prepared by the Procurement Officer.

3-203.16 *Award*

The Procurement Officer shall make a written determination showing the basis on which the award was found to be most advantageous to the State based on the factors set forth in the Request for Proposals.

3-203.17 *Publicizing Awards*

Written notice of award shall be sent to the successful bidder. Notice of award shall be made available to the public.

3-204 **Small Purchases**

Any procurement not exceeding the amount established by regulation **may** be made in accordance with small purchase procedures promulgated by the Personal Service Contract Review Board, provided that procurement requirements shall neither be artificially divided nor shall the extent of the service required be underestimated so as to constitute a small purchase under this section.

Agencies are encouraged to seek competition to the fullest extent practicable on all contracts. For contracts exceeding \$50,000, the agency shall at a minimum solicit three written responses. The written responses shall be made part of the procurement file. In the event three written responses are not obtained, the agency shall include a memo to the procurement file explaining why this was not accomplished.

3-204.01 *Application*

In accordance with Section 3-204 (Small Purchases), this Regulation is established for procurements of \$100,000 or less for services.

3-204.02 *Authority to Make Small Purchases*

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3-204.02.1 *Amount*

The Purchasing Agency may use this Regulation if the procurement is to be \$100,000 or less for services. If these methods are not used, the other methods of source selection provided in Section 3-201 (Methods of Source Selection) shall apply.

3-204.02.4 *Available from One Source Only*

If the service is available from only one source, the sole source procurement method set forth in Section 3-205 (Sole Source Procurement) of these regulations shall be used unless the procurement is a small purchase as specified in Subsection 3-204.05 of this section.

3-204.02.5 *Division of Requirements*

Procurement requirement shall not be artificially divided to avoid using the other source selection methods set forth in Section 3-201 (Methods of Source Selection) of the Personal Service Contract Regulations. Generally, there should only be one contract within an agency per vendor for a particular service type.

3-204.03 *Competition for Small Purchases of Services Greater than \$50,000, Not Exceeding \$100,000***3-204.03.1** *Procedure*

Insofar as it is practical for small purchases of services greater than \$50,000 and not exceeding \$100,000, no less than three sources shall be solicited to submit written responses that are recorded and placed in the procurement file. Written responses must be either signed, on letterhead, or otherwise identifiable to be valid. Written responses shall, at a minimum, contain the following information:

- (1) a statement of price;
- (2) terms of the agreement;
- (3) description of services offered by the contractor to the agency;
- (4) name, address and telephone number of the offeror.

If this method is used, award shall be made to the business offering the lowest and best bid or proposal.

3-204.03.2 *Records*

The names of the businesses submitting quotations and the date and amount of each quotation shall be recorded and maintained as a public record.

3-204.05 *Small Purchases of \$50,000 or Less*

The head of a Purchasing Agency shall adopt operational procedures for making small purchases of \$50,000 or less. Such operational procedures shall provide for obtaining adequate and reasonable competition and for making records to properly account for funds and to facilitate auditing of the Purchasing Agency. No approval by the Personal Service Contract Review Board is required for these purchases.

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3-205 Sole-Source Procurement

A contract may be awarded for contracts without competition when the head of a purchasing agency, or a designee determines in writing that there is only one source for the required service.

3-205.01 Application

The provisions of this regulation apply to all sole-source procurements unless emergency conditions exist as defined in Section 3-206 (Emergency Procurements).

3-205.02 Conditions for Use of Sole-Source Procurement

Sole-source procurement is not permissible unless a requirement is available from only a single supplier.

The determination as to whether a procurement shall be made as a sole source shall be made and approved by the head of the purchasing agency or designee of such officer. Such determination and the basis therefor shall be in writing. Such officer may specify the application of such determination and the duration of its effectiveness. In cases of reasonable doubt, competition should be solicited. Any request by a using agency that a procurement be restricted to one potential contractor shall be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need.

3-205.04 Negotiation in Sole-Source Procurement

The head of the purchasing agency or his/her designee shall conduct negotiations, as appropriate, as to price, delivery, and terms. These contracts must still be forwarded to the Personal Service Contract Review Board for approval prior to any services being rendered, if the contract amount is greater than \$100,000.

3-206 Emergency Procurements

Notwithstanding any other provision of these Regulations, the head of a Purchasing Agency, or a designee may make or authorize others to make emergency procurements under emergency conditions as defined in these regulations; provided that such emergency procurements shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

3-206.01 Application

The provisions of this Regulation apply to every procurement made under emergency conditions that will not permit other source selection methods to be used.

3-206.02 Definition of Emergency Conditions

The term "emergency" shall mean any circumstances caused by fire, flood, explosion, storm, earthquake, epidemic, riot, insurrection, or caused by any inherent defect due to defective construction, or when the immediate preservation of order or public health is necessary by reason of unforeseen emergency, or when the restoration of a condition of usefulness of any public building, equipment, road or bridge appears advisable, or in the case of a public utility when there is a failure of any machine or other thing used and useful in the generation, production or distribution of electricity, water or natural gas or in the transportation or treatment of sewage; or when the delay incident to obtaining competitive bids could cause adverse impact upon the governing authorities or agency,

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its employees or its citizens. See Section 31-7-1 (f) Mississippi Code of 1972, Annotated.

3-206.03 *Scope of Emergency Procurement*

Emergency procurement shall be limited to those services necessary to meet the emergency.

3-206.04 *Authority to Make Emergency Procurements*

Any state agency may make emergency procurements when an emergency condition arises and the need cannot be met through normal procurement methods; provided, approval by the executive head of the agency or designee shall be obtained prior to the procurement. The contract should be forwarded to the Personal Service Contract Review Board within 10 days for SPAHRS and SAAS processing, if the contract amount is greater than \$100,000.

3-206.05 *Source Selection Methods*

3-206.05.1 *General*

The procedure used shall be selected to assure that the required services are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.

3-206.05.2 *After Unsuccessful Competitive Sealed Bidding*

Competitive, sealed bidding is unsuccessful when bids received pursuant to an Invitation for Bids are unreasonable, noncompetitive, or the low bid exceeds available funds as certified by the appropriate fiscal officer, and time or other circumstances will not permit the delay required to re-solicit competitive sealed bids. If emergency conditions exist after an unsuccessful attempt to use competitive sealed bidding, an emergency procurement may be made.

3-206.06 *Determination of Emergency Procurement*

The Procurement Officer or the agency official responsible for procurement shall make a written determination stating the basis for an emergency procurement and for the selection of the particular contractor. Such determination shall be included in the contract justification.

3-301 **Cancellation of Invitations for Bids or Requests for Proposals**

An Invitation for Bids, a Request for Proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interest of the State. The reasons therefore shall be made part of the contract file.

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3-301.01 *Scope of this Regulation*

The provisions of this Regulation shall govern the cancellation of any solicitations whether issued by the State under competitive sealed bidding, competitive sealed proposals or any other source selection method, and rejection of bids or proposals in whole or in part.

3-301.02 *Policy*

Solicitations should only be issued when there is a valid procurement need unless the solicitation states that it is for informational purposes only.

Preparing and distributing a solicitation requires the expenditure of time and funds. Businesses likewise incur expense in examining and responding to solicitations. Therefore, although issuance of a solicitation does not compel award of a contract, a solicitation is to be canceled only when there are compelling reasons to believe that the cancellation of the solicitation is in the State's best interest.

3-301.03 *Cancellation of Solicitation--Notice*

Each solicitation issued by the State shall declare that the solicitation may be canceled as provided in this Regulation.

3-301.04 *Cancellation of Solicitation; Rejection of All Bids or Proposals***3-301.04.1** *Prior to Opening*

- (1) As used in this section, "opening" means the date set for opening of bids, receipt of Unpriced technical offers in multi-step sealed bidding, or receipt of proposal in competitive sealed proposals.
- (2) Prior to opening, a solicitation may be canceled in whole or in part when the head of a purchasing agency/designee determines in writing that such action is in the State's best interest for reasons including but not limited to:
 - (a) the buying agency no longer requires the services;
 - (b) the buying agency no longer can reasonably expect to fund the procurement; or
 - (c) proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable.
- (3) When a solicitation is canceled prior to opening, notice of cancellation shall be sent to all businesses solicited.
- (4) The notice of cancellation shall:
 - (a) identify the solicitation;
 - (b) briefly explain the reason for cancellation; and
 - (c) where appropriate, explain that an opportunity will be given to compete on any re-solicitation or any future procurements of similar services.

3-301.04.2 *After Opening - Prior to Award*

- (1) After opening but prior to award, all bids or proposals may be rejected in whole or in part when the head of a purchasing agency determines in writing that such action is in the State's best interest for reasons including but not limited to:
 - (a) the services being procured are no longer required;
 - (b) ambiguous or otherwise inadequate specifications were part of the solicitation;
 - (c) the solicitation did not provide for consideration of all factors of significance to the buying entity;
 - (d) prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
 - (e) all otherwise acceptable bids or proposals received are at clearly unreasonable prices; or

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- (f) there is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith.
- (2) A notice of rejection should be sent to all businesses that submitted bids or proposals, and it shall conform to Section 3-301.04.1 (4).

3-301.04.3 *After Opening - After Award*

After opening and after award, **but prior to signing a contract**, an award may be cancelled when the head of a purchasing agency determines in writing that such action is in the State's best interest for reasons including, but not limited to:

- (1) available funding for the contractual service has been discontinued;
- (2) credible evidence has been presented that the procurement process was tainted;
- (3) the solicitation document allows the agency's stated reason for cancellation.

3-301.04.3 *Documentation*

The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.

3-301.05 *Rejection of Individual Bids or Proposals*

3-301.05.1 *General*

This section applies to rejections of individual bids or proposals in whole or in part.

3-301.05.2 *Notice in Solicitation*

Each solicitation issued by the state shall provide that any bid or proposal may be rejected in whole or in part when in the best interest of the State as provided in this Regulation.

3-301.05.3 *Reasons for Rejection*

(1) *Bids.* As used in this section, "bid" means any offer providing pricing submitted in competitive sealed bidding or in the second phase of multi-step sealed bidding and includes submissions under Section 3-204 (Small Purchases), if no changes in offers are allowed after submission. Reasons for rejecting a bid include but are not limited to:

- (a) the business that submitted the bid is non-responsible as determined under Section 3-401.05 (Written Determination of Non-responsibility Required) of this chapter;
- (b) the bid is not responsive; that is, it does not conform in all material respects to the Invitation for Bids, see Section 3-202.14.2 (Bid Evaluation and Award, Responsibility and Responsiveness) of this chapter; or
- (c) the supply or service item offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the Invitation for Bids. (See Section 3-202.14.3 (Bid Evaluation and Award, Product Acceptability) of this chapter.)

(2) *Proposals.* As used in this section, "proposal" means any offer submitted in response to any solicitation for a proposal, including an offer under Section 3-204 (Small Purchases), except a bid as defined in Section 3-301.05.3 (1). Unless the solicitation states otherwise, proposals need not be unconditionally accepted without

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alteration or correction, and the stated requirements may be revised or clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:

- (a) the business that submitted the proposal is non-responsible as determined under Section 3-401 (Responsibility of Bidders and Offerors).
- (b) the proposal ultimately (that is, after any opportunity has passed for altering or clarifying the proposal) fails to meet the announced requirements of the State in some material respect; or
- (c) the proposed price is clearly unreasonable.

3-301.05.4 *Notice of Rejection*

Vendors that have submitted bids or proposals which are rejected shall be notified of the rejection and the reasons therefor.

3-301.06 *"All or None" Bids or Proposals*

Only when provided by the solicitation may a bid or proposal limit acceptance to the entire bid or proposal offering. Otherwise, such bids or proposals shall be deemed to be non-responsive. If the bid or proposal is properly so limited, the buying entity shall not reject part of such bid or proposal and award on the remainder. "All or none" bids shall not be requested unless it is determined that a multiple number of bidders can provide pricing on all items requested. If the "all or none" requirement limits the bidding to the point that only a single responsive bid is received, the Personal Service Contract Review Board will not approve the request unless ample justification is presented.

3-301.07 *Disposition of Bids or Proposals*

When bids or proposals are rejected, or a solicitation canceled after bids or proposals are received, the bids or proposals which have been opened shall be retained in the procurement file, or if unopened, returned to the bidders or offerors.

3-401 **Responsibility of Bidders and Offerors**

- (1) *Determination of Non-responsibility*: A written determination of Non-responsibility of a bidder or offeror shall be made. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of Non-responsibility with respect to such bidder or offeror.
- (2) *Right of Nondisclosure*: Information furnished by a bidder or offeror pursuant to this section shall not be disclosed outside of the Office of the Personal Service Contract Review Board or the purchasing agency if so requested by the bidder or offeror, except as might be required by Section 25-61-9 of the Mississippi Code.

3-401.01 *Application*

A determination of responsibility or Non-responsibility shall be governed by this Regulation.

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3-401.02 *Standards of Responsibility*

3-401.02.1 *Standards*

Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor has:

- (1) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- (2) a satisfactory record of performance;
- (3) a satisfactory record of integrity;
- (4) qualified legally to contract with the State; and
- (5) supplied all necessary information in connection with the inquiry concerning responsibility.

3-401.02.2 *Information Pertaining to Responsibility*

The prospective contractor shall supply information requested by the Procurement Officer concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the Procurement Officer shall base the determination of responsibility upon any available information or may find the prospective contractor non-responsible if such failure is unreasonable.

3-401.03 *Ability to Meet Standards*

The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

- (1) evidence that such contractor possesses such necessary items;
- (2) acceptable plans to subcontract for such necessary items; or
- (3) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

3-401.04 *Duty Concerning Responsibility*

Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible.

3-401.05 *Written Determination of Non-responsibility Required*

If a bidder or offeror **who otherwise would have been awarded a contract** is found non-responsible, a written determination of Non-responsibility setting forth the basis of the finding shall be prepared by the head of a purchasing agency. A copy of the determination shall be sent promptly to the non-responsible bidder or offeror. The final determination shall be made part of the procurement file.

3-402 Prequalification of Suppliers

Prospective suppliers may be prequalified for particular types of services. Solicitation mailing lists of potential contractors shall include but shall not be limited to such prequalified suppliers.

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3-402.01 *Prequalification***3-402.01.1** *General*

Prospective contractors may be prequalified for bidder lists, but distribution of the solicitation shall not be limited to prequalified contractors, nor may a prospective contractor be denied award of a contract simply because such contractor was not prequalified. The fact that a prospective contractor has been prequalified does not necessarily represent a finding of responsibility.

3-403 **Cost or Pricing Data**

- (1) *Contractor Certification:* A contractor shall when requested by the buying entity except as provided in Subsection 3 of this section, submit cost or pricing data and shall certify that, to the best of its knowledge and belief, the cost or pricing data submitted was accurate, complete, and current as of a mutually determined specified date.
- (2) *Price Adjustment:* Any contract, change order, or contract modification under which a certificate is required shall contain a provision that the price to the State, including profit or fee, shall be adjusted to exclude any significant sums by which the State finds that such price was increased because the contractor-furnished cost or pricing data was inaccurate, incomplete, or not current as of the date agreed upon between the parties.
- (3) *Cost or Pricing Data Not Required:* The requirements of this section need not be applied to contracts:
 - (a) where the contract price is based on adequate price competition;
 - (b) where the contract price is based on established market prices;
 - (c) where contract prices are set by law or regulations; or
 - (d) where it is determined in writing that the requirements of this section may be waived, and the reasons for such waiver are stated in writing.
- (4) When it is determined that offeror or bidder should provide cost or pricing data to justify a bid or proposal, this Regulation may be used as a guideline for such negotiation.

3-403.01 *Scope of Regulation*

This Regulation sets forth the pricing policies which are applicable to contracts of any type and any price adjustments thereunder when cost or pricing data are required to be submitted. The provisions of this Regulation requiring submission of cost or pricing data do not apply to a contract let by competitive sealed bidding (including multi-step bidding) except as may be provided herein.

3-403.02 *Requirement for Cost or Pricing Data*

Submission of Cost or Pricing Data. Cost or pricing data may be required in support of a proposal when:

- (1) any contract expected to exceed \$100,000 is to be awarded by competitive sealed proposals or by sole-source procurement;
- (2) an emergency procurement is made in excess of \$100,000, but such data may be submitted after contract award; or

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- (3) the Procurement Officer makes a written determination that the circumstances warrant required submission of cost or pricing data; provided, however, cost or pricing data shall not be required where the contract award is made pursuant to competitive sealed bidding.

3-403.03 *Meaning of Terms "Adequate Price Competition," "Established Market Prices," and "Prices Set by Law or Regulation"*

3-403.03.1 *Application*

The terms "adequate price competition," "established market prices," and "prices set by law or regulations" shall be construed in accordance with the following definitions:

(1) *Adequate Price Competition*

Price competition exists if competitive sealed proposals are solicited and at least two responsible offerors independently compete for a contract to be awarded to the responsible offeror submitting the lowest evaluated price by submitting priced offers (or best and final offers) meeting the requirements of the solicitation. If the foregoing conditions are met, price competition shall be presumed to be "adequate" unless the Procurement Officer determines in writing that such competition is not adequate.

(2) *Established Market Prices*

(a) "Established Market Price" means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the contractor and may be an indication of the reasonableness of price.

(b) If, despite the existence of an established market price, and after consultation with the prospective contractors, the Procurement Officer considers that such price is not reasonable, cost or pricing data may be requested.

(3) *Prices Set by Law or Regulation*

The price of a service is set by law or regulation if some governmental body establishes the price that the offeror or contractor may charge the State and other customers.

3-403.04 *Submission of Cost or Pricing Data and Certification*

3-403.04.1 *Time and Manner*

When cost or pricing data are required, they shall be submitted to the Procurement Officer prior to beginning price negotiations at any reasonable time and in any reasonable manner prescribed by the Procurement Officer. When the Procurement Officer requires the offeror or contractor to submit cost or pricing data in support of any proposal, such data shall either be actually submitted or specifically identified in writing.

3-403.04.2 *Obligation to Keep Data Current*

The offeror or contractor is required to keep such submission current until the negotiations are concluded or, if applicable, until the contract is expired.

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3-403.04.3 *Time for Certification*

The offeror or contractor shall certify as soon as practicable after agreement is reached on price that the cost or pricing data submitted are accurate, complete, and current as of a mutually determined date prior to reaching agreement. Certification shall be made using the certificate set forth in Section 3-403.05 (Certificate of Current Cost or Pricing Data) of this Regulation.

3-403.04.4 *Refusal to Submit Data*

A refusal by the offeror to supply the required data shall be referred to the head of a purchasing agency, whose duty shall be to determine in writing whether to disqualify the noncomplying offeror, to defer award pending further investigation, or to enter into the contract. A refusal by a contractor to submit the required data to support a price adjustment shall be referred to the head of a purchasing agency who shall determine in writing whether to further investigate the price adjustment, not to allow any price adjustment, or to set the amount of the price adjustment.

3-403.05 *Certificate of Current Cost or Pricing Data*

3-403.05.1 *Form of Certificate*

When cost or pricing data must be certified, a certificate substantially as set forth below shall be included in the contract file along with any award documentation required under these regulations. The offeror or contractor shall be required to submit the certificate as soon as practicable after agreement is reached on the contract price or adjustment.

CERTIFICATE OF CURRENT COST OR PRICING DATA

This is to certify that, to the best of my knowledge and belief, cost or pricing data as defined in Section 3-101.01 of the Mississippi Personal Service Contract Procurement Regulations submitted, either actually or by specific identification in writing (see Section 3-403.04) to the Procurement Officer in support of, are accurate, complete, and current as of (date) (month) (year).****

This certification includes the cost or pricing data supporting any advance agreement(s) between the offeror and the State of Mississippi which are part of the proposal.

Firm

Name

Title

*Date of Execution****

---(End of Certificate)---

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- * Describe the proposal, quotation, request for price adjustment or other submission involved, giving appropriate identifying number (e.g., RFP No. _____).
- ** The effective date shall be a mutually determined date prior to but as close to the date when price negotiations were concluded and the contract price was agreed to as possible. The responsibility of the offeror or contractor is not limited by the personal knowledge of the offeror's or contractor's negotiator if the offeror or contractor had information reasonably available at the time of agreement, showing that the negotiated price is not based on accurate, complete, and current data.
- *** This date should be as soon after the date when the price negotiations were concluded and the contract price was agreed to as practical.

3-403.05.2 *Representation as to Accuracy of Cost or Pricing Data*

Although the certificate pertains to "cost or pricing data," it is not to be construed as a representation as to the accuracy of the offeror's or contractor's judgment on the estimated portion of future costs or projections. It does, however, constitute a representation as to the accuracy of the data upon which the offeror's or contractor's judgment is based. A Certificate of Current Cost or Pricing Data shall not substitute for examination and analysis of the offeror's or contractor's proposal.

3-403.05.3 *Inclusion of Notice and Contract Clause*

Whenever it is anticipated that a Certificate of Current Cost or Pricing Data may be required, notice of this requirement shall be included in the solicitation. If such a certificate is required, the contract shall include a clause giving the State a contract right to a reduction in the price as provided in Section 3-403.06 (Defective Cost or Pricing Data).

3-403.05.4 *Exercise of Option*

The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data were used does not require recertification or further submission of data.

3-403.06 *Defective Cost or Pricing Data*

3-403.06.1 *Overstated Cost or Pricing Data*

If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, the State is entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee, was increased because of the defective data. Judgmental errors made in good faith concerning the estimated portions of future costs or projections do not constitute defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data were not used or relied upon, the price should be reduced in such amount. In establishing that the defective data caused an increase in the contract price, the Procurement Officer is not expected to reconstruct the negotiation by speculating as to what would have been the mental attitudes of the negotiating parties if the correct data had been submitted at the time of agreement on price.

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3-403.06.2 *Offsetting Understated Cost or Pricing Data*

In determining the amount of a downward adjustment, the contractor shall be entitled to an offsetting adjustment for any understated cost or pricing data submitted in support of price negotiations for the same pricing action up to the amount of the State's claim for overstated cost or pricing data arising out of the same pricing action.

3-403.06.3 *Dispute*

If the contractor and the Procurement Officer cannot agree as to the existence of defective cost or pricing data or amount of adjustment due to defective cost or pricing data, the Procurement Officer shall set an amount in accordance with Subsections 3-403.06.1 and 3-403.06.2 of this section.

3-403.07 *Price Analysis Techniques*

Price analysis is used to determine if a price is reasonable and acceptable. It involves an evaluation of the prices for the same or similar items or services. Examples of price analysis criteria include but are not limited to:

- (1) price submission of prospective bidders or offers in the current procurement;
- (2) prior price quotations and contract prices charged by the bidder, offeror, or contractor;
- (3) prices published in catalogs or price lists;
- (4) prices available on the open market; and
- (5) in-house estimates of cost.

In making such analysis, consideration must be given to any differing terms and conditions.

3-403.08 *Cost Analysis Techniques*

Cost analysis includes the appropriate verification of cost or pricing data, and the use of this data to evaluate:

- (1) specific elements of costs;
- (2) the necessity for certain costs;
- (3) the reasonableness of amounts estimated for the necessary costs;
- (4) the reasonableness of allowances for contingencies;
- (5) the basis used for allocation of indirect costs;
- (6) the appropriateness of allocations of particular indirect costs to the proposed contract;
- (7) the reasonableness of the total cost or price.

3-403.09 *Evaluations of Cost or Pricing Data*

Evaluations of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other offerors and any independent Mississippi price and cost estimates. They shall also include consideration of whether such costs are reasonable and allowable.

3-501 Types of Contracts

Subject to the limitations of this section, any type of contract which will promote the best interests of the State may be used. A cost reimbursement contract may be used only when a determination is made in writing that such contract is to be less costly to the State than any other type or that it is impracticable to obtain the services required except under such a contract.

3-501.01 Scope of Regulation

This Regulation contains descriptions of types of contracts and limitations as to when they should be utilized by the State in its procurements.

3-501.02 Cost-Plus-a-Percentage-of-Cost Contracting

Except for a cost-plus-a-percentage-of-cost contract which agencies are urged to avoid, the use of any type of contract is permissible.

Commentary: *A cost-plus-a-percentage-of-cost contract is one in which, prior to beginning the work, the parties agree that the fee will be a predetermined percentage of the total cost of the work. Thereby, the more the contractor spends, the greater its fee, and the contractor's incentive may, therefore, be to incur cost at the expense of the State and not to economize.*

3-501.03 Policy Regarding Selection of Contract Types

3-501.03.1 General

The selection of an appropriate contract type depends on factors such as the nature of the services to be procured, the uncertainties which may be involved in contract performance, and the extent to which the State or the contractor is to assume the risk of the cost of performance of the contract. Contract types differ in the degree of responsibility assumed by the contractor.

The objective when selecting a contract type is to obtain the best value in needed services in the time required and at the lowest cost or price to the State. In order to achieve this objective, the Procurement Officer, before choosing a contract type, should review those elements of the procurement which directly affect the cost, time, risk, and profit incentives bearing on the performance.

Among the factors to be considered in selecting any type of contract are:

- (1) the type and complexity of services being procured;
- (2) the difficulty of estimating performance costs such as the inability of the State to develop definitive specifications, to identify the risks to the contractor inherent in the nature of the work to be performed, or otherwise to establish clearly the requirements of the contract;

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- (3) the administrative costs to both parties;
- (4) the degree to which the State must provide technical coordination during the performance of the contract;
- (5) the effect of the choice of the type of contract on the amount of competition to be expected;
- (6) the stability of material or commodity market prices or wage levels;
- (7) the urgency of the requirement; and
- (8) the length of contract performance.

Commentary: *It is self-defeating for the State to select a type of contract that would place an unreasonable economic risk on the contractor, since such action may tend to jeopardize satisfactory performance of the contract.*

3-501.03.2 *Use of Contract Types Not Herein Described*

The provisions of this Section 3-501 describe and define the principal contract types. Any other type of contract may be used provided the head of a purchasing agency and the Personal Service Contract Review Board determine that such use is in the State's best interest.

3-501.04 *Types of Fixed-Price Contracts*

3-501.04.1 *General*

A fixed-price contract places responsibility on the contractor for the performance of the service in accordance with the contract terms at a price that may be firm or may be subject to contractually specified adjustments. The fixed-price contract is appropriate for use when the extent and type of work necessary to meet requirements can be reasonably specified and the cost can be reasonably estimated. A fixed-price type of contract is the only type of contract that can be used in competitive sealed bidding.

Commentary: *Fixed-price contracts are preferred for use in procurements and should be used whenever possible. However, when risks are unknown or not readily measurable in terms of cost, the use of such contracts can result in inflated prices and inadequate competition; poor performance, disputes, and claims when performance proves difficult; or excessive profits when anticipated contingencies do not occur.*

3-501.04.2 *Firm Fixed-Price Contract*

A firm fixed-price contract provides a price that is not subject to adjustment because of variations in the contractor's cost of performing the work specified in the contract. It should be used whenever prices which are fair and reasonable to the State can be established at the outset. Bases upon which firm fixed prices may be established include:

- (1) adequate price competition for the contract;
- (2) comparison of prices in similar prior procurements in which prices were fair and reasonable;

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- (3) establishment of realistic costs of performance by utilizing available cost or pricing data and identifying uncertainties in contract performance; or
- (4) use of other adequate means to establish a firm price.

3-501.04.3 *Fixed-Price Contract with Price Adjustment*

- (1) A fixed-price contract with price adjustment provides for variation in the contract price under special conditions defined in the contract. An adjustment would be implied in the authority for change orders as would be applicable to construction contracts.
- (2) If the contract permits unilateral action by the contractor to bring about the condition under which a price increase may occur, the contract shall reserve to the State the right to reject the price increase and terminate without cost the future performance of the contract. The contract shall also require that notice of any such price increase shall be given within such time prior to its effective date as is specified in the contract.

3-501.05 *Definite Quantity and Indefinite Quantity Contracts***3-501.05.1** *Definite Quantity*

A definite quantity contract is a fixed-price contract that provides for delivery of a specified quantity of services either at specified times or when ordered.

3-501.05.2 *Indefinite Quantity*

An indefinite quantity contract is a contract for an indefinite amount of services to be furnished at specified times, or as ordered, that establishes unit prices of a fixed-price type. Generally an approximate quantity or the best information available as to quantity is stated in the solicitation. The contract may provide a minimum quantity the State is obligated to procure and may also provide for a maximum quantity provision that limits the State's obligation to procure.

3-501.05.3 *Requirements Contracts*

A requirements contract is an indefinite quantity contract for services that obligates the State to order all the actual requirements of designated using agencies during a specified period of time. The obligation to order the State's actual requirements is limited only by the provisions of Section 31-7-12 (1) Mississippi Code. For the protection of the State and the contractor, requirements contracts shall include the following:

- (1) A provision which requires the State and any other users named in the solicitation to order their actual requirements of the services covered. However, the State may reserve in the solicitation and in the resulting contract the right to take bids separately if a particular quantity requirement arises which exceeds the State's normal requirements or an amount specified in the contract.
- (2) Two exemptions from ordering under the contract occur when:
 - (a) the head of a purchasing agency approves a finding that the supply or service available under the contract will not meet a nonrecurring, special need of the buying entity;

- (b) services are performed incidental to the State's own programs, such as industries of correctional institutions, that can satisfy the need.

3-503 Multi-Term Contracts

- (1) *Specified Period.* Unless otherwise provided by law, a contract for services may be entered into for a period of time **not to exceed four (4) years with an option to renew for one year**, provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.
- (2) *Determination Prior to Use.* Prior to the utilization of a multi-term contract, it shall be determined in writing:
- (a) that estimated requirements cover the period of the contract and are reasonably firm and continuing; and
 - (b) that such a contract will serve the best interests of the State of Mississippi by encouraging effective competition or otherwise promoting economies in State procurement.

3-503.01 Multi-Term Contracts--General

A multi-term contract is appropriate when it is in the best interest of the State to obtain uninterrupted services extending over more than one fiscal period, where the performance of such services involves high start-up costs or where a changeover of service contractors involves high phase-in/phase-out costs during a transition period. Special production refers to production for contract performance which requires alteration of the contractor's facilities or operations involving high start-up costs. The contractual obligation of both parties in each fiscal period succeeding the first is subject to the appropriation and availability of funds therefor. The contract shall provide that in the event that funds are not available for any succeeding fiscal period, the remainder of such contract shall be canceled.

3-503.02 Conditions for Use of Multi-Term Contracts

A multi-term contract may be used when it is determined in writing by the Procurement Officer that:

- (1) the furnishing of long-term services are required to meet needs of the State; and
- (2) a multi-term contract will serve the best interests of the State by encouraging effective competition or otherwise promoting economies in State procurement. The following factors are among those relevant to such a determination:
 - (a) firms which are not willing or able to compete because of high start-up costs or capital investment in facility expansion will be encouraged to participate in the competition when they are assured of recouping such costs during the period of contract performance;
 - (b) lower production costs because of larger quantity or service requirements, and substantial continuity of production or performance over a longer period of time, can be expected to result in lower unit prices;

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- (c) stabilization of the contractor's work force over a longer period of time may promote economy and consistent quality; or
- (d) the cost and burden of contract solicitation, award, and administration of the procurement may be reduced.

Commentary: *One example of a situation which may be suitable for a multi-year contract is a trash removal contract where the contractor would have to buy trucks and other equipment solely to meet the State's requirements, but such equipment would have a useful life in excess of one year.*

3-503.03 *Multi-Term Contract Procedure*

3-503-03.1 *Solicitation:*

The solicitation shall state:

- (1) the amount of services required for the proposed contract period;
- (2) that a unit price shall be given for each service, and that such unit prices shall be the same throughout the contract;
- (3) that the multi-term contract will be canceled only if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the State's rights or the contractor's rights under any termination clause in the contract;
- (4) that the Procurement Officer must notify the contractor on a timely basis that the funds are or are not available for the continuation of the contract for each succeeding fiscal period;
- (5) that a multi-term contract may be awarded and how award will be determined.

3-503.03.2 *Award*

Award shall be made as stated in the solicitation and permitted under the source selection method utilized.

3-503.03.3 *Cancellation*

- (1) "Cancellation," as used in multi-term contracting, means the cancellation of the total requirements for the remaining portion of the contract because funds were not appropriated or otherwise made available. The contract for the first fiscal period shall not be canceled. Cancellation results when the Procurement Officer:
 - (a) notifies the contractor of nonavailability of funds for contract performance for any fiscal period subsequent to the first; or
 - (b) exercises cancellation provision of the original contract.
- (2) These provisions on cancellation of multi-term contracts do not limit the rights of the State or the contractor under any termination clause of the contract if the contract is terminated pursuant to that clause rather than canceled as provided in this subsection. If a contract is canceled for lack of funding, all obligations due the contractor for the period during which funding was available shall be paid. Cancellation for reasons of nonavailability of funding relieves the purchaser of all contractual obligation for any contract period subsequent to the date of cancellation. No contract shall be canceled for lack of funds during a fiscal year period when funds were allocated for such contract.

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3-503.03.4 Contract Clause

The following clause, or one substantially similar, shall be used by the Purchasing Agency in multi-term contractual agreements:

“Availability of Funds

It is expressly understood and agreed that the obligation of the [agency] to proceed under this agreement is conditioned upon the appropriation of funds by the Mississippi State Legislature and the receipt of state and/or federal funds. If the funds anticipated for the continuing fulfillment of the agreement are, at anytime, not forthcoming or insufficient, either through the failure of the federal government to provide funds or of the State of Mississippi to appropriate funds or the discontinuance or material alteration of the program under which funds were provided or if funds are not otherwise available to the state, the [agency] shall have the right upon ten (10) working days written notice to the contractor, to terminate this agreement without damage, penalty, cost or expenses to the state of any kind whatsoever. The effective date of termination shall be as specified in the notice of termination.”

Commentary: *Multi-term contracts, as set forth in this section, should be interpreted to mean a contract having effective dates spanning appropriation periods two or more fiscal years and would obligate the purchasing entity to purchase a specified quantity of services over that period.*

3-504 Multiple Source Contracting**3-504.01 Incremental Award****3-504.01.1 General**

An incremental award is an award of portions of a definite quantity requirement to more than one contractor. Each portion is for a definite quantity and the sum of the portions is the total definite quantity required. An incremental award may be used only when awards to more than one bidder or offeror for different amounts of the same item are necessary to obtain the total quantity or the required delivery.

3-504.01.2 Intent to Use

If an incremental award is anticipated prior to issuing a solicitation, the State shall reserve the right to make such an award and the criteria for award shall be stated in the solicitation.

3-504.01.3 Determination Required

The Procurement Officer shall make a written determination setting forth the reasons for the incremental award, which shall be made a part of the procurement file.

3-504.02 Multiple Award**3-504.02.1 General**

A multiple award is an award of an indefinite quantity contract for services to more than one bidder or offeror when the State is obligated to order all of its actual requirements for the specified services from those contractors. The obligation to order the State's actual requirements is limited by Section 75-2-306, of the Mississippi Code.

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3-504.02.2 *Limitations on Use*

A multiple award may be made when an award to two or more bidders or offerors for similar services is necessary for adequate delivery. Any multiple award shall be made in accordance with the provisions of Section 3-202 (Competitive Sealed Bids), 3-203 (Competitive Sealed Proposals), Section 3-204 (Small Purchases) and Section 3-206 (Emergency Procurements), as applicable. Multiple awards shall not be made when a single award will meet the State's needs without sacrifice of economy or service. Awards shall not be made for the purpose of dividing the business, making available product or supplier selection to allow for user preference unrelated to utility or economy, or avoiding the resolution of tie bids. Any such awards shall be limited to the least number of suppliers necessary to meet the valid requirements of using agencies.

3-504.02.3 *Contract and Solicitation Provisions*

All eligible users of the contract shall be named in the solicitation, and it shall be mandatory that the actual requirements of such users that can be met under the contract be obtained in accordance with the contract, provided, that:

- (1) the State shall reserve the right to take bids separately if a particular quantity requirement arises which exceeds its normal requirement or an amount specified in the contract;
- (2) the State shall reserve the right to take bids separately if the head of a Purchasing Agency approves a finding that the supply or service available under the contract will not meet a nonrecurring special need of the agency; and
- (3) the contract may allow the State to procure services performed, incidental to the State's own programs, such as industries of correctional institutions, when such services satisfy the need.

3-504.02.4 *Intent of Use*

If a multiple award is anticipated prior to issuing a solicitation, the State shall reserve the right to make such an award, and the criteria for award shall be stated in the solicitation.

3-504.02.5 *Determination Required*

The Procurement Officer shall make a written determination setting forth the reasons for a multiple award, which shall be made a part of the procurement file.

Commentary. *Within these regulations, contract arrangements which establish more than one source of service are either multiple or progressive award contracts. Competitive sealed bidding is the conventional procurement method for establishing such contracts, although competitive sealed proposals, small purchase procedures, and emergency procurements may be used if appropriate as determined in accordance with Section 3-203, Section 3-204, or Section 3-206, respectively.*

3-601 **Right to Inspect Facility**

The State may, at reasonable times, inspect the place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded by the State.

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3-601.01 *Inspection of Facility or Site*

Circumstances under which the State may perform inspections include, but are not limited to, inspections of the contractor's site in order to determine:

- (1) whether the standards set forth in Section 3-401.02 (Standards of Responsibility) have been met or are capable of being met; and
- (2) if the contract is being performed in accordance with its terms.

3-601.02 *Access to Place of Business*

The State may enter a contractor's or subcontractor's place of business to:

- (1) inspect services for acceptance by the State pursuant to the terms of a contract; and
- (2) audit cost or pricing data or audit the books and records of any contractor or subcontractor pursuant to Section 3-602 (Right to Audit Records) of those Regulations; and
- (3) investigate in connection with an action to debar or suspend a person from consideration for award of contracts pursuant to Section 6-102 (Authority to Debar or Suspend).

3-601.03 *Inspection and Testing of Services*

3-601.03.1 *Solicitation and Contractual Provisions*

Mississippi contracts may provide that the State may inspect services at the contractor's or subcontractor's facility and perform tests to determine whether they conform to solicitation requirements or, after award, to contract requirements and are therefore, acceptable. Such inspections and tests shall be conducted in accordance with the terms of the solicitation and contract.

3-601.04 *Conduct of Inspections*

3-601.04.1 *Inspectors*

Inspections or tests shall be performed so as not to unduly delay the work of the contractor or subcontractor. The presence or absence of an inspector shall not relieve the contractor or subcontractor from any requirements of the contract.

3-601.04.2 *Location*

When an inspection is made in the place of business of a contractor or subcontractor, such contractor or subcontractor shall provide without charge all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing.

3-601.04.3 *Time*

Inspection or testing of services performed at the place of business of any contractor or subcontractor shall be performed at reasonable times.

3-602 Right to Audit Records

(1) *Audit of Cost or Pricing Data.* The State may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data pursuant to Section 3-403 (Cost or Pricing Data) to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.

(2) *Contract Audit.* The State shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract to the extent that such books and records related to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of three years from the date of final payment under the prime contract and by the subcontractor for a period of three years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing.

3-602.01 Statutory Authority to Audit

Pursuant to Section 25-9-120 of the Mississippi Code, the Personal Service Contract Review Board may request the State Auditor to conduct a performance audit on any personal or professional service contract.

3-602.02 Auditors; Audit Reports

Audits requested under this subpart shall be performed by the State Auditor's Office. Such audit reports shall be made available to the party audited upon request.

3-602.03 Cost or Pricing Data Audit

3-602.03.1 General

The Personal Service Contract Review Board may require an audit of cost or pricing data that has been submitted under Section 3-403 (Cost Data or Price Data and Analysis).

3-602.03.2 Conditions for an Audit

An audit should be required, in respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor, when there is:

- (1) a question as to the adequacy of accounting policies or cost systems;
- (2) a substantial change in the methods or levels of operation;
- (3) previous unfavorable experience indicating doubtful reliability of estimating, accounting, or purchasing methods;
- (4) a lack of cost experience due to the procurement of a new supply or service, or
- (5) other evidence that an audit is in the State's best interests as determined by the Personal Service Contract Review Board.

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Commentary: *Subject to final determination by the State Auditor, the report should contain the following in respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor:*

- (1) a description of the original proposal and all submissions of cost or pricing data;*
- (2) an explanation of the basis and the method used in preparing the proposal;*
- (3) a statement identifying any cost or pricing data not submitted but examined by the auditor which has a significant effect on the proposed cost or price;*
- (4) a description of any deficiency in the cost or pricing data submitted and an explanation of its effect on the proposal;*
- (5) a statement summarizing those major points where there is a disagreement as to the cost or pricing data submitted; and*
- (6) a statement identifying any information obtained from other sources.*

3-602.05 *Contract Audit*

3-602.05.01 *Contracts Audited*

Under the authority of Section 25-9-120 of the Mississippi Code Ann. (1997), any contract for professional or personal services may be audited when auditing would be appropriate to assure satisfactory performance.

3-602.05.02 *Conditions for an Audit*

The requirement of a contract audit may be warranted when a question arises in connection with:

- (1) the financial condition, integrity, and reliability of the contractor or subcontractor;
- (2) any prior audit experience;
- (3) the adequacy of the contractor's or subcontractor's accounting system;
- (4) the number or nature of invoices or reimbursement vouchers submitted by the contractor or subcontractor for payment;
- (5) the use of federal assistance funds;
- (6) the fluctuation of market prices affecting the contract;
- (7) contract performance or measurement of deliverables; or
- (8) any other situation when the Personal Service Contract Review Board finds that such an audit is necessary for the protection of the State's interest, including random audits to ensure compliance with these regulations.

The scope of the audit may be limited by the Personal Service Contract Review Board.

Commentary: *The scope of the report will depend on the scope of the audit ordered; however, the report should contain specific reference to the terms of the contract to which the audited data related and a statement of the degree to which the auditor believes the audited data evidence compliance with those terms.*

3-602.07 *Retention of Books and Records*

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3-602.07.1 *Relating to Cost and Pricing Data*

Any contractor who receives a contract, change order, or contract modification for which cost or pricing data is required under Section 3-403 (Cost or Pricing Data) shall maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract.

3-602.07.02 *Relating to State Contracts*

Books and records that relate to a State contract, including subcontracts, other than a firm fixed-price contract, awarded under any method set forth in Section 3-602.01 (Statutory Authority to Audit) shall be maintained:

- (1) by a contractor, for three years from the date of final payment under the prime contract; and
- (2) by a subcontractor, for three years from the date of final payment under the subcontract.

3-701 **Finality of Determinations**

The determinations required by Section 3-202 (6) (Competitive Sealed Bidding, Correction or Withdrawal of Bids; Cancellation of Awards), Section 3-203 (1) (Competitive Sealed Proposals, Conditions for Use), Section 3-203 (7) (Competitive Sealed Proposals, Award), Section 3-205 (Sole-Source Procurement), Section 3-206 (Emergency Procurements), Section 3-401 (1) (Responsibility of Bidders and Offerors, Determination of Nonresponsibility), Section 3-403 (3) (Cost or Pricing Data, Cost or Pricing Data Not Required), Section 3-501 (Types of Contracts), and Section 3-503 (2) (Multi-Term Contracts, Determination Prior to Use) are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

3-702 **Reporting of Anticompetitive Practices**

When for any reason collusion or other anti-competitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the Attorney General.

3-702.01 *Anticompetitive Practices*

For the purposes of this Regulation, an anti-competitive practice is a practice among bidders or offerors which reduces or eliminates competition or restrains trade. An anti-competitive practice can result from an agreement or understanding among competitors to restrain trade such as submitting collusive bids or proposals, or result from illicit business actions which have the effect of restraining trade, such as controlling the resale price of products or an improper collective refusal to bid. Indications of suspected anti-competitive practices include, but are not limited to, identical bids or proposals, rotated low bids or proposals, sharing of the business, "tie-in" sales, resale price maintenance, and group boycotts. See Section 3-702.05 (Other Anti-competitive Practices).

Commentary: Bidders and offerors are prohibited by federal and Mississippi law (Mississippi Code Ann. 75-21-15 (Rev. 2000) from collectively responding to a solicitation in a manner that controls directly or indirectly the price of a supply, service, or construction item sought. This prohibition may extend generally to such actions as establishing any of the following: minimum or maximum prices, uniform list prices, uniform credit terms, uniform discounts, uniform costs and mark-ups, uniform trade-in allowances, specified price differentials between varying grades of the same product, price ranges, price scales or price calculation formulas, and minimum fee schedules.

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3-702.02 Independent Price Determination

Every solicitation shall provide that by submitting a bid or offer, the bidder or offeror certifies that the price submitted was independently arrived at without collusion.

Editorial Note: *The purchasing agency may want to require the signing of a separate form which certifies that the price in the bid or offer was arrived at independently.*

3-702.03 Detection of Anti-competitive Practices

In order to assist in ascertaining whether or not an anti-competitive practice may have occurred or may be occurring, the Procurement Officer should be alert and sensitive to conditions of the market place and will often find it necessary to study past procurements including, as appropriate, the following:

- (1) A study of the bidding history of a commodity or service item over a period of time sufficient to determine any significant bidding patterns or changes.
- (2) A review of similar Mississippi contract awards over a period of time.
- (3) Consultation with outside sources of information, such as bidders or offerors who have competed for similar Mississippi business in the past but who are no longer competing for such business.

Commentary: *Guidance on the detection of collusive bidding may be found in Government Purchasing and the Antitrust Laws at pages 21-24 (National Association of Attorneys General and National Association of State Purchasing Officials, May 1977).*

3-702.04 Identical Bidding and Price Fixing

The term "identical bidding" means the submission by bidders or offerors of the same total price or the same price on a particular line item. The submission of identical bids may or may not signify the existence of collusion.

In seeking to determine whether collusion has taken place, the Procurement Officer should view the identical bids against present and past pricing policies of the bidders or offerors, the structure of the industry involved including comparisons of prices and the nature of the service.

Commentary: *Executive Order No. 10,936, 26 Fed. Reg. 3555 (1961) directs the U.S. Attorney General to invite state and local governments to report tie bids.*

3-702.05 Other Anti-competitive Practices

3-702.05.1 General

The practices which are described in Subsection 3-702.05.2 through Section 3-702.05.6 and which the Procurement Officer suspects might be anti-competitive shall be reported to the Personal Service Contract Review Board.

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3-702.05.2 *Rotated Low Bids or Proposals*

Rotated low bids or proposals result where all bidders or offerors participating in the collusive scheme submit bids and by agreement alternate being the lowest bidder or offeror. To aid in determining whether rotation may be occurring, the Procurement Office must review past similar procurements in which the same bidders or offerors have participated.

3-702.05.3 *Sharing of the Business*

Sharing of the business occurs where potential bidders or offerors allocate business among themselves based on the customers or the territory involved. Thus, a Procurement Officer might discover that a potential bidder or offeror is not participating in a Mississippi procurement because a particular Mississippi agency, or a particular territory has not been allocated to such bidder or offeror.

3-702.05.4 *"Tie-in" Sales*

"Tie-in" sales are those in which a bidder or offeror attempts to sell one supply or service only upon the condition that the Procurement Officer purchase another particular supply or service.

3-702.05.5 *Group Boycott*

A group boycott results from an agreement between competitors not to deal with another competitor or not to participate in, for instance, a Mississippi procurement until the boycotting competitors' conditions are met by the boycotted competitor or the State. The boycott of a competitor by other competitors may have an effect on the market structure or price of a service needed by the State.

Commentary: *Protecting the principles of competition in public procurement is a difficult and often complex task. A program of communication and cooperation between procurement and legal offices, institutionalized to the extent feasible, is essential in combating anti-competitive practices.*

3-703 **Retention of Procurement Records:**

All procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules by the Department of Archives and History.